



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

RECEIVED

SEP 27 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition
Act of 1992: Rate Regulation

)
)
) MM Docket No. 92-266

)
) MM Docket No. 93-215

)
DOCKET FILE COPY ORIGINAL

Comments of the Chief Counsel for Advocacy
of the United States Small Business Administration
on the Petitions for Reconsideration

Jere W. Glover, Esq.
Chief Counsel
Barry Pineles, Esq.
Assistant Chief Counsel
Office of Advocacy
United States Small Business
Administration
409 Third Street, S.W.
Suite 7800
Washington, DC 20416
(202) 205-6532

September 27, 1995



the FCC developed a new size standard for small cable operators and made all operators that meet the definition eligible for dramatic regulatory relief. The most significant aspect of the Sixth Report was the authorization for small cable operators to raise their rates up to \$1.24 per channel (if cost-justified) and such increases would be presumptively reasonable under the 1992 Cable Act. The Office of Advocacy commended the Commission for its efforts to redress the problems faced by small cable operators.

II. *The Petitions for Reconsideration*

Pursuant to FCC rules, 47 C.F.R. § 1.429, two parties, the Georgia Municipal Association (GMA) and the State of New Jersey, filed timely petitions for reconsideration. The GMA requests the Commission to repeal the small operator rules because the information upon which the FCC arrived at the \$1.24 figure was incorrect. The State of New Jersey's petition for reconsideration is styled as a request for a stay of the Sixth Report; the State wishes the operation of the order stayed until it resolves a dispute with Service Electric, a small cable operator eligible for relief under the Sixth Report.¹ After reviewing each of the petitions, the Office of Advocacy does not

¹ The Office of Advocacy understands that the State of New Jersey may have settled its differences with Service Electric in which case the New Jersey request for a stay is moot. However, the Office of Advocacy has been unable to confirm that the case is settled.

believe that either meets the standards adopted by the Commission for granting petitions for reconsideration.

III. *Standards for Reconsideration and Granting Stay*

The FCC rules provide for the filing of petitions for reconsideration in order that the Commission be able to redress grievances of adversely affected parties prior to their seeking review in court. Thus, petitions for reconsideration will be granted only in those circumstances in which the FCC determines that the current application of the rules would lead to a result not intended by the Commission, injures a party in a manner unforeseen by the FCC, or demonstrates that the current rulemaking, if allowed to stand unaltered, would constitute arbitrary and capricious rulemaking.

The Commission applies the same standard for granting a stay of its rules that the courts apply in the issuance of a temporary restraining order. For the State of New Jersey to obtain a stay from the FCC, it must demonstrate that a likelihood of prevailing on the merits of its claim; that New Jersey will suffer irreparable injury if a stay is not granted; no other interested parties will be harmed if the stay is granted; and the public interest favors the granting of a stay.

IV. *The Commission Should Deny the State of New Jersey's Request for a Stay*

Equitable relief requires the assertion of rights without delay and the doctrine of laches will be used to defeat a claim for equitable relief if the party seeking relief failed to exercise its rights promptly. The State of New Jersey has known for more than a year that the Commission might modify its regulatory regime for small cable operators. MM Docket No. 92-266, Second Order on Reconsideration at ¶ 118 (released March 30, 1994). If the State had desired to resolve this dispute under the regulatory regime defined in the Second Order on Reconsideration, then it should have proceeded apace. The State cannot now be heard to complain that the new regulatory regime inhibits its ability to obtain an appropriate settlement with Service Electric. As a result, the doctrine of laches should bar the State of New Jersey from obtaining relief.

Even if we assume that the State of New Jersey would succeed on the merits of its claim, the State would not suffer irreparable harm if the Sixth Report were to go into effect. Fundamentally, the State of New Jersey claims that the FCC's decision would permit Service Electric to charge more than \$74 per month for its cable service and such a rate is exorbitant. That contention can be tested under Commission regulations and Service Electric can be required to repay any overcharges.

Therefore, the State is not irreparably injured since its citizens can obtain refunds if the rates are not reasonable.

Nor can the State demonstrate that other parties will not be injured by the granting of a stay. The Office of Advocacy is aware of numerous small cable operators facing financial difficulties that would be overcome by the increases in rates authorized in the Sixth Report. Furthermore, the simplified forms that can be filed by these operators under the Sixth Report will reduce their administrative costs. Imposition of a stay would harm these thousands of small cable operators for the sole purpose of New Jersey obtaining a settlement with one cable operator. Thus, numerous other parties will be harmed by the grant of a stay and the balance of equities militate against the granting of a stay.

The State of New Jersey does not meet any of the standards for obtaining a stay of the Sixth Report and Order. As a result, the Commission should deny the State of New Jersey's request.

*V. The Commission Should deny the Georgia Municipal Association
Petition for Reconsideration*

The GMA bases its petition on the fact that the FCC determined the reasonability of the \$1.24 per channel figure from the data collected through cable operators' filing of Form 1220.

The GMA asserts that the data on Form 1220 misstates the costs faced by cable operators and any conclusion on the reasonability of costs based on the Form 1220 constitutes arbitrary and capricious rulemaking.² Specifically, the GMA believes that small cable operators may be overstating the value of their intangible assets on the Form 1220.

The GMA readily admits that it has only limited amounts of data on the accuracy of the Form 1220s filed by cable operators. The Office of Advocacy believes that this is a slim reed indeed upon which to reconsider the otherwise well-reasoned analysis of the Commission in the Sixth Report. More importantly, subsequent changes to FCC regulations reduce the importance of intangible assets in the calculation to be performed for determining the costs that need to be recovered. As a result, the GMA request for reconsideration should be denied.

The GMA also contends that local franchising authorities will face higher costs in regulating the rates of small cable operators. The new short forms to be filed by small cable operators (which contain significantly less detailed information than the Form 1220s) will not raise the cost of regulating basic

² The GMA does not asseverate that the FCC's decision in the Sixth Report will have unintended consequences. The FCC's action in the Sixth Report will prevent municipal franchising authorities from reducing potential rate increases by small cable operators; however, this is a fully intended consequence of the Commission's action.

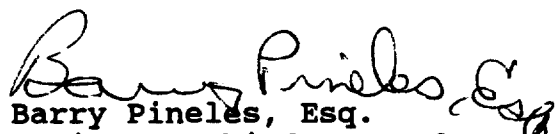
cable service by local franchising authorities. If anything, the simplification should reduce the costs faced by local franchising authorities. In essence, the FCC's decision in the Sixth Report constitutes a win-win situation for both cable operators and local franchising authorities. The GMA has not provided any data to support its assertion and the FCC should deny the petition.

VI. Conclusion

The Office of Advocacy was instrumental in obtaining Commission consideration of small cable operator concerns and does not wish that small cable operators face any further delay in obtaining regulatory relief. Neither request meets the standards mandated by the Commission to delay the immediate implementation of the Sixth Report and the petitions for reconsideration should be denied.

Respectfully submitted,


Jere W. Glover, Esq.
Chief Counsel for Advocacy


Barry Pineles, Esq.
Assistant Chief Counsel

SEP 27 1995

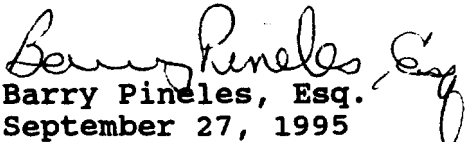
Certificate of Service

I hereby certify that a true and correct copy of the foregoing comments in objection to the petitions for reconsideration was either hand delivered or mailed, postage paid by the Small Business Administration to each of the following:

Mr. William Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20416

Ms. Deborah T. Poritz
Attorney General of New Jersey
Mr. James Eric Andrews
Deputy Attorney General
Division of Law - 5th Floor
124 Halsey Street
P.O. Box 45029
Newark, NJ 07101

Mr. James V. Burgess, Jr.
Mr. Donald W. Schanding
Georgia Municipal Association
201 Pryor Street SW
Atlanta, GA 30303


Barry Pineles, Esq.
September 27, 1995